Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1196

ASHBACKER RADIO CORPORATION, a Michigan Corporation,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

Your petitioner respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a petition for a writ of certiorari to review an order of the United States Court of Appeals for the District of Columbia entered without opinion January 24, 1945,

by a panel of three judges, dismissing an appeal of the petitioner from a decision of the Federal Communications Commission granting without hearing an application of one Fetzer Broadcasting Company which application was in conflict with and mutually exclusive of a pending application of the petitioner.

B.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 23, 1925, and Section 402(e)* of the Communications Act of 1934, on the ground that the order of the Court below deprives the petitioner of the hearing upon its application which is provided for by Sections 309(a)* and 319(a)* of the Communications Act of 1934 and deprives it of the appeal provided for by Section 402(b)(2)* of that Act.

C.

QUESTIONS PRESENTED.

When there are pending before the Federal Communications Commission two conflicting mutually-exclusive applications from the same area for the same wave-length assignment:

1. May the Commission lawfully grant one of these applications, ex parte, and simultaneously set down the other application for hearing?
2. If so, is the "hearing" thus offered, in face of the accomplished grant of the competing application, such a fair hearing as is provided for by the Communications Act of 1934 and guaranteed by the Fifth Amendment to the Constitution of the United States?

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* Reprinted in the Appendix.

3. Does such grant to one of two competing applicants for the same facility aggrieve the other applicant or adversely affect his interests so as to bring him within the class of persons permitted to sue out an appeal to the United States Court of Appeals for the District of Columbia under Section 402(b) (2)* of the Communications Act of 1934?

D.

MATERIAL FACTS AND PROCEEDINGS BEFORE THE FEDERAL COMMUNICATIONS COMMISSION AND THE COURT BELOW.

The petitioner is the licensee of WKBZ, the only broadcasting station at Muskegon, Michigan. The frequency assigned the petitioner, 1490 kilocycles, is one of poor propagation characteristics so that petitioner is not able to provide a satisfactory service to the entire Muskegon area.

A substantial improvement in the petitioner's service could be accomplished by use of the frequency 1230 kilocycles, heretofore available for assignment in the Muskegon area. It has been ascertained that the frequency 1230 kilocycles is the only frequency now available in the Muskegon area which might be used to improve the petitioner's service.

Accordingly, on April 29, 1944, the petitioner filed with the Federal Communications Commission an application denominated "for construction permit", dated April 27, 1944, requesting a change in frequency to 1230 kilocycles.

This application was in conflict with an application filed March 20, 1944 by the Fetzer Broadcasting Company for a new station to operate at 1230 kilocycles at Grand Rapids, Michigan. It is agreed that the two applications were in conflict and mutually exclusive. It is entirely impossible for the two applicants to use the same frequency and either of them render any service whatsover.

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* Reprinted in the Appendix.

The two applications were studied by the Legal, Engineering and Accounting Divisions of the Commission, which submitted their several recommendations *ex parte*. Both applications came before the Commission at a meeting held June 27, 1944. On June 28, 1944, the Commission announced that, without hearing, it had granted the Fetzer application and had "designated for hearing" the petitioner's application.

The petitioner is without information as to what reasons may have actuated the Commission in this step. The petitioner believes its application was, in the public interest, superior to the Fetzer application and, had the petitioner been accorded a hearing upon its application or an opportunity to test, at a public hearing, such claims or representations as might have been made on behalf of the Fetzer application, the petitioner would probably have demonstrated that, in the public interest, its application should have been granted and the Fetzer application denied.

Accordingly, pursuant to Section 405* of the Communications Act of 1934, the petitioner filed with the Commission a request for hearing, rehearing or other relief. It recited the foregoing and further pointed out: that the community of Grand Rapids wherein Fetzer was being authorized to construct a new station, was already receiving adequate service from two existing stations; that in addition, station WKZO at Kalamazoo, Michigan, also owned and operated by Fetzer already maintained studios at Grand Rapids and claimed coverage of that community; that the proposed grant to Fetzer violated Section 3.24* of the Rules and Regulations of the Commission in that it provided an additional service to a commuuity already well served, at the expense of the listeners in the vicinity of Muskegon, who do not now have a single primary service; that the grant results in common ownership of two stations, each of which renders a primary service to a substantial percentage of the primary service area of the other, con-

* Reprinted in the Appendix.

trary to Section 3.35* of the Commission's regulations. It was argued that the action of the Commission denied the petitioner the fair hearing to which each applicant is entitled under the Communications Act of 1934.

Fetzer filed an opposition to the foregoing petition. The Commission (one Commissioner dissenting and two not participating) on September 12, 1944, published its "Decision and Order on Petition for Hearing, Rehearing and Other Relief"*, and denied the petition of the petitioner. The decision of the Commission contains elaborate recitals of fact under a heading which begins, "A comparison of important facts relating to the two applications indicates the following: . . .", which facts were obtained and evaluated by the Commission *in camera* without according the petitioner any opportunity to cross-examine witnesses or to adduce testimony in explanation or rebuttal. The decision of the Commission also alleges that

> "... the Commission has not denied petitioner's application. It has designated the application for hearing as required by Section 309(a) of the Act. At this hearing, petitioner will have ample opportunity to show that its operation as proposed will better serve the public interest than will the grant of the Fetzer application as authorized June 27, 1944."

While the foregoing petition was pending and before the Commission decision thereon, the Commission, on August 1, 1944, issued and served upon the petitioner a notice setting up a proposed "hearing" upon the petitioner's application and prescribing the issues upon which it was proposed to hold the purported hearing. This notice stated that the application of the petitioner would not be granted by the Commission unless the issues specified in the notice were determined in favor of the applicant on the basis of a record duly and properly made by means of a formal hearing.

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* Reprinted in the Appendix.

Among the issues thus required to be determined in favor of the petitioner was the question whether any interference which would result from the simultaneous operation of the petitioner's station and the station which the Commission had just authorized for Fetzer.

Since it is conceded that the petitioner and Fetzer cannot use 1230 kilocycles simultaneously without destructive interference, it was obvious that the purported hearing was one in name only and that the grant of the Fetzer application was designed and intended as a denial without hearing of the petitioner's application.

Accordingly, pursuant to Section 402(b)(2)* of the Communications Act, the petitioner filed its notice of appeal to the United States Court of Appeals for the District of Columbia.

On October 27, 1944, the Commission filed a motion to dismiss the appeal on the claim that the Court had no jurisdiction under Section 402(b) to entertain it.

On November 9, 1944, the petitioner filed its opposition to this motion.

On January 24, 1945, the Court granted the Commission's motion and dismissed the appeal.

Since this action was taken by order *per curiam*, without opinion, it may be assumed that the Court acted on the allegations and reasoning set up in the Commission's brief in support of its motion to dismiss: that the two applications were mutually exclusive; that the Commission had made a "comparative examination of the two applications" and "found" the grant of the Fetzer application would serve public interest and had hence granted it while setting the petitioner's application for hearing; that the Commission in denying the petitioner's subsequent request for hearing had relied on all "facts" set up in the opinion thereon; that these actions did not constitute a denial of the petitioner's application; that hence the petitioner was not aggrieved or adversely affected within the meaning of

* Reprinted in the Appendix.

Section 402(b)(2) of the Communications Act; that the results of the petitioner's hearing cannot be foretold; that the Commission might, in future, in some way "modify" the Fetzer license or refuse to renew it,* that the petitioner's "opportunity to press its application to the fullest has in no way been impaired by a grant of the competing Fetzer application."

Whether or not the Court followed this argument, it did overrule, without opinion, its earlier decision in *Symons Broadcasting Company* v. *Federal Radio Commission* (1933), 62 App. D. C. 46.**

If the Court can further be assumed to have ruled that the "hearing" offered the petitioner was a fair hearing, then the Court also overruled, without opinion, its earlier decision in *Chicago Federation of Labor* v. *Federal Radio Commission* (1930), 59 App. D. C. 333, which imposed a far more heavy burden than proving "public interest, convenience and necessity would be served," in the special case of the applicant who seeks to supplant an existing station.***

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* As a matter of fact, the Commission issues licenses for three-year periods.

** Wherein it was said, at page 47:

"And in addition to this, we think it not untimely to say that in granting and refusing applications for licenses, where two or more stations are applicant for the same frequency, it is the duty of the commission to grant either party asking it a hearing on due notice, for otherwise there is a denial of due process and a substitution in its place of arbitrary power, and that, of course, may not be countenanced."

*** At page 334 it is said:

"It is not consistent with true public convenience, interest, or necessity, that meritorious stations like WBBM and KFAB should be deprived of broadcasting privileges when once granted to them, which they have at great cost prepared themselves to exercise, unless clear and sound reasons of public policy demand such action. The cause of independent broadcasting in general would be seriously endangered and public interests correspondingly prejudiced, if the licenses of estab-

E.

REASONS FOR GRANTING THE WRIT.

(1) *The Court below nullified the right to judicial review conferred by Section 402 (b)(2) of the Communications Act of 1934, upon a class of persons who are aggrieved or whose interests are adversely affected, namely competitive applicants.*

This is a question of substance relating to the construction and application of a statute of the United States which has not been, but should be, settled by this Court.

Heretofore, it has been the rule in the Court below (the court having exclusive jurisdiction in the field) that such applicants were entitled to appear. *Symons Case, supra.*

But the Commission has followed the policy of attempting to circumscribe the definitions of permissive appellants.

This Court has granted a writ of certiorari in *Federal Communications Commission* v. *National Broadcasting Company, et al.* (1943), 319 U. S. 239, wherein it was held that a licensee of a station which would receive interference from the operation of another station as a result of the grant complained of was entitled to appeal as a person aggrieved. See also *Scripp-Howard Radio, Inc.* v. *Federal Communications Commission* (1942), 316 U. S. 4.

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lished stations should arbitrarily be withdrawn from them and appropriated to the use of other stations. This statement does not imply any derogation of the controlling rule that all broadcasting privileges are held subject to the reasonable regularity power of the United States, and that the public convenience, interest, and necessity are the paramount considerations."

To the same effect is *Journal Company* v. *Federal Radio Commission* (1931), 60 App. D. C. 92, 94: "Where a broadcasting station has been constructed and maintained in good faith, it is in the interests of the public and common justice to the owner of the station that its status should not be injuriously affected, *except for compelling reasons.*" (Emphasis supplied.) See also *Evangelical Luthern Synod* v. *Federal Communications Commission* (1939), 70 App. D. C. 270, 273 and *Yankee Network, Inc.* v. *Federal Communications Commission* (1939), 71 App. D. C. 11, 22.

This Court also granted a writ of certiorari in *Federal Communications Commission* v. *Sanders Brothers Radio Station* (1940), 309 U. S. 476, wherein it was held that a licensee likely to be financially injured by the issue of a license to another is a person having a sufficient interest to appeal.

The present question, relating to one who is affected by the grant of the conflicting mutually-exclusive application of another presents a correlative question which should be answered, particularly in view of the departure of the Court below from its previously-expounded position.

Moreover the solution will be of additional guidance to Circuit Courts of Appeals confronted with related questions of some perplexity arising from other administrative tribunals. *Associated Industries of New York State, Inc. v. Ickes, Secretary of the Interior, et al.* (C. C. A., 2d), 134 F. (2d) 694, *United States Cane Sugar Refiners' Association* v. *McNutt* (C. A. A., 2d), 138 F. (2d) 116, *Gilbert* v. *Securities and Exchange Commission* (C. C. A., 7th), December 20, 1944. See also *Simmons* v. *Federal Communications Commission*, —— U. S. App. D. C. ——, November 13, 1944.

Similar questions involving the participation of a competing applicant have arisen before the Civil Aeronautics Board. See *Northwest Airlines, Inc., Chicago-Milwaukee-New York Service*, C. A. B. Docket No. 629, December 16, 1944.

Heretofore the Federal Communications Commission, for its own administration, has held that competing applicants for the same wavelength in the same area were persons "aggrieved or whose interests were adversely affected" by the grant of one of the applications. *In the Matter of the Midnight Sun Broadcasting Company*, 6 F. C. C. 319.

(2) *In dismissing this appeal the Court has approved a procedural innovation of the Commsision by means of which it proposes to deny applications without according the hearing required by law but instead by according a nom-*

inal, inadequate and unfair hearing, the outcome of which is predetermined.

The Commission considers two competing applications. It forthwith grants one and permits a station to be established and commence regular operation. Meanwhile, it sets the other application for hearing. It notifies that applicant that his application will be denied if it should appear that the operation of his station will cause interference with the station which the Commission has just authorized. In simple terms that is what has happened in this case. It constitutes nothing less than the denial of an application without hearing.

The applicant having filed its application at approximately the same time as Fetzer, the two applications should have been heard upon a comparative basis for a determination of public interest. Instead, the Commission made an *ex parte* pre-selection of the Fetzer application on "facts" which the petitoner could not test. *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Company*, 227 U. S. 88.

If, and when the petitioner comes to its own "hearing," it is confronted with the necessity of overthrowing an expensively established existing station upon which the public has come to rely, which is an entirely different matter than making the comparative showing the statute indicates. *Chicago Federation of Labor Case, supra, Journal Company Case, supra, Yankee Network Case, supra, Evangelical Lutheran Synod Case, supra.*

After failure in that task, an appeal by the petitioner under Section 402(b) (1), applicable to those whose applications have been denied, would be a valueless and empty remedy.

The Commission is, of course, not unduly circumscribed in the type of hearing it must accord an applicant, but "the laws under which these agencies operate prescribe the fundamentals of fair play, they require that interested parties be afforded an opportunity for hearing and that judg-

ment must express a reasoned conclusion". *Federal Communications Commission* v. *Pottsville Broadcasting Company* (1940), 309 U. S. 134, 143-144.

The current *volte face* by the Commission, terminating hearings for conflicting applicants for the same facility is a use of a procedural confection to an unlawful purpose which (if the lower Court continues to permit it) represents a departure from the accustomed and usual course of administrative proceedings and of judicial proceedings such as to call for an exercise of this Court's power of supervision.

F.

CONCLUSION.

Wherefore, your petitioner prays that a writ of certiorari be granted under the seal of this Court directed to the United States Court of Appeals for the District of Columbia, and for such further relief as to this Court may seem proper.

Dated this 24th day of April, 1945.

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APPENDIX.

COMMUNICATIONS ACT OF 1934

Sec. 309(a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

* * *

Sec. 319(a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

* * *

Sec. 402(b) (1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modifi-

cation of an existing radio station license; whose application is refused by the Commission.

* * *

Sec. 402(b) (2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

* * *

Sec. 402 (c) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are aribitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

* * *

Sec. 405. After a decision, order, or requirement has made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear: *Provided, however,* That in the case of a decision, order, or requirement made under Title III, the time within which application for rehearing may be made shall be limited to twenty days after the effective date thereof, and such application may be made by any party or any person aggrieved or whose interests are adversely affected thereby. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission,

or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted, the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination, shall be subject to the same provisions as an original order.

* * *

RULES, REGULATIONS AND DECISIONS OF THE FEDERAL COMMUNICATIONS COMMISSION.

Section 3.24. *Broadcast facilities, showing required.* An authorization for a new standard broadcast station or increase in facilities of an existing station will be issued only after a satisfactory showing has been made in regard to the following, among others:

(a) That the proposed assignment will tend to effect a fair, efficient, and equitable distribution of radio service among the several states and communities.

(b) That objectionable interference will not be caused to existing stations or that if interference will be caused the need for the proposed service outweighs the need for the service which will be lost by reason of such interference. That the proposed station will not suffer interference to such an extent that its service would be reduced to an unsatisfactory degree. (For determining objectionable interference, see engineering Standards of Allocation and Field Intensity Measurements in Allocation.)

(c) That the applicant is financially qualified to construct and operate the proposed station.

(d) That the applicant is legally qualified. That the applicant (or the person or persons in control of an applicant corporation or other organization) is of good character and possesses other qualifications sufficient to provide a satisfactory public service.

(e) That the technical equipment proposed, the location of the transmitter, and other technical phases of operation

comply with the regulations governing the same, and the requirements of good engineering practice. (See technical regulations herein and Locations of Transmitters of Standard Broadcast Stations.)

(f) That the facilities sought are subject to assignment as requested under existing international agreements and the Rules and Regulations of the Commission.

(g) That the public interest, convenience, and necessity will be served through the operation under the proposed assignment.

• • •

Sec. 3.35. *Multiple ownership.* No license shall be granted for a standard broadcast station, directly or indirectly owned, operated or controlled by any person where such station renders or will render primary service to a substanital portion of the primary service area of another standard broadcast station, directly or indirectly owned, operated or controlled by such person, except upon a showing that public interest, convenience and necessity will be served through such multiple ownership situation.

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Corrected Copy

Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

File No. B2-P-3590

In re Application of

JOHN E. FETZER AND RHEA Y. FETZER d/b as FETZER BROADCASTING COMPANY, GRAND RAPIDS, MICHIGAN

For Construction Permit

DECISION AND ORDER ON PETITION FOR HEARING, REHEARING AND OTHER RELIEF

By the Commission (Case, Commissioner, dissenting; Fly, Chairman and Wakefield, Commissioner, not participating):

The Commission has before it a petition filed (July 17, 1944) by Ashbacker Radio Corporation (WKBZ), Muske-

gon, Michigan, for hearing, rehearing or other relief, which is directed against the action of the Commission June 27, 1944 granting the application filed (March 20, 1944) by John E. Fetzer and Rhea Y. Fetzer, doing business as Fetzer Broadcasting Company, Grand Rapids, Michigan, for construction permit (B2-P-3590) to erect a new standard broadcast station at that place to operate on the frequency 1230 kc with 250 watts power, unlimited time.

Petitioner's station, WKBZ, is licensed to operate on the frequency 1490 kc with 250 watts power, unlimited time. On May 5, 1944, petitioner filed an application for construction permit (B2-P-3609) requesting a change in frequency from 1490 kc to 1230 kc.

The simultaneous use of 1230 kc at Grand Rapids and Muskegon, Michigan would result in intolerable interference to both applicants, and therefore these applications are actually exclusive. The Commission on June 27, 1944, upon comparative examination of the two applications, found that a grant of the Fetzer application (B2-P-3590) would serve public interest, convenience and necessity, and accordingly, granted the same pursuant to Section 309(a) of the Communications Act of 1934. Since a grant of the Fetzer application precluded a grant without hearing of the Ashbacker application (B2-P-3609), the Commission on the same day designated the latter application for hearing in accordance with Section 309(a) of the Act.

The petition alleges that "WKBZ is the only station rendering a primary service to Muskegon County, population 107,852"; that upon its presently assigned frequency of 1490 kc, "and under the high attenuation conditions which prevail in that area", WKBZ is unable to render satisfactory service during daytime to those sections of the County more than 15.5 miles distant from its transmitter; that at night, WKBZ, is unable to render a satisfactory service to portions of greater Muskegon or to communities such as Fruitport and Laketon "which are normally tributary to Muskegon"; that the purpose of its application to change frequency "was to extend WKBZ's service to listeners who do not now receive primary service from any station"; that the City of Grand Rapids and portions of Kent County (where the new Fetzger station is to be located) now receive primary service from Stations WOOD (5kw—1300 kc—unlimited time) and WLAV (250 watts—1340 kc—unlimited time), both in Grand Rapids; and that a third sta-

tion at Grand Rapids operating with 250 watts, unlimited time on 1230 kc will simply provide "a third service for listeners already well served by these two existing stations".

The petition further alleges that Station WKZO at Kalamazoo, Michigan "with 5000 watts power, unlimited time on 590 kc renders primary service to Grand Rapids, advertises that its coverage to Grand Rapids is satisfactory and maintains studios at Grand Rapids". Upon information and belief, it is alleged that WKZO is owned and operated by Fetzer Broadcasting Company, a Michigan corporation, which is controlled by John E. Fetzer and Rhea Y. Fetzer, the applicant in B2-P-3590.

Based upon the foregoing allegations, petitioner contends that the grant of the Fetzer application and the designation of petitioner's application for hearing:

1. Contravenes Section 307(b) of the Communications Act of 1934 and Section 3.24 of the Rules and Regulations of the Commission in that "it provides an additional radio broadcasting service to a community already well served at the expense of the listeners in the vicinity of Muskegon who do not now have a single primary service";

2. Results in common ownership of two stations "each of which renders primary service to a substantial portion of the primary service of the other contrary to Section 3.35 of the Commission's Rules";

3. Denies to petitioners "the fair hearing to which every applicant is entitled under Section 309(a) of the Communications Act and attempts to substitute therefore a 'hearing' after all the issues between Ashbacker and Fetzer have been resolved in favor of Fetzer"; and

4. "Violates the due process clause of the Fifth Amendment to the Constitution of the United States".

Petitioner prays that the Commission reconsider and set aside its action granting the Fetzer application, designate both applications for a public hearing or, in the alternative, stay the issuance of the construction permit for the use of 1230 kc to Grand Rapids until action is taken upon this petition and until petitioner has had an opportunity to file its notice of appeal with the Court of Appeals pursuant to Section 402(b)(2) of the Communications Act of 1934.

On July 22, 1944, the opposition of Fetzer Broadcasting Company to the Ashbacker petition was filed.

A comparison of important facts relating to the two applications indicates the following:

A. UNITED STATES CENSUS FIGURES (1940)

Muskegon, Michigan:	Grand Rapids, Michigan:
Population, 47,697 (not a metropolitan center)	Population, 164,292 (Grand Rapids metropolitan district: population, 209,873)

B. SERVICE PROPOSED BY EACH

Ashbacker, Muskegon, Mich.		Fetzer, Grand Rapids, Michigan
Proposed nighttime service	81,629	Proposed (new) nighttime service 202,800
Present nighttime service	77,657	
Proposed gain service (about 5%)	3,972	
Proposed daytime service	107,340	Proposed (new) daytime service 238,800
Present daytime service	97,525	
Proposed gain in service (about 10%)	9,815	

C. INTERFERENCE TO EXISTING STATIONS FROM THE OPERATION OF EACH STATION AS PROPOSED

Ashbacker, Muskegon, Michigan	Fetzer, Grand Rapids, Michigan
Involves objectionable interference to about 5% of the primary daytime service area of Station WHBY, Appleton, Wisconsin	Does not involve objectionable interference to any existing station

D. PRIMARY SERVICE NOW RECEIVED BY EACH AREA DAY AND NIGHT

Muskegon, Michigan	Grand Rapids, Michigan
Daytime: WGN and WMAQ, Chicago, Ill.; WOOD, Grand Rapids, and WKZO, Kalamazoo, Mich.; WTNJ, Milwaukee, Wisconsin	Daytime: WOOD and WLAV, Grand Rapids, Mich.; WJR, Detroit, Mich.; WGN and WMAQ, Chicago, Ill.; WKZO, Kalamazoo, Mich.
Nighttime: WGN and WMAQ. Chicago,, Ill.	Nighttime: WOOD and WLAV, Grand Rapids, Mich.; WJR, Detroit, Mich.; WGN and WMAQ, Chicago, Ill.

From the foregoing, it is manifest that the Fetzer grant does not, as petitioner contends, contravene Section 307(b) of the Communications Act of 1934 and Section 3.24 of the Rules and Regulations of the Commission in so far as these

require the Commission to provide a fair, efficient and equitable distribution of radio service among the several states and communities, since the change in frequency requested by petitioner would if granted, result in a slight increase in service to an area and population which already receives primary service day and night from several stations, and this slight increase in service to the Muskegon area would be offset by the objectionable interference to Station WHBY at Appleton, Wisconsin, by about the same proportion as the increase in nighttime service to the Muskegon station as a result of its operation as proposed; whereas the Fetzer grant will result in the establishment of a new service to a very substantial population which can be instituted without resulting in objectionable interference to any existing service.

Petitioner also contends that it was error for the Commission to grant the Fetzer application because it results in "common ownership of two stations, each of which renders primary service to a substantial portion of the primary service area of the other, contrary to Section 3.35[1] of the Commission's Regulations". This contention is without merit. Although it is true that Station WKZO, Kalamazoo, Michigan, is owned by a Michigan corporation whose controlling stockholders are the applicants for the Grand Rapids station, it is not true that the proposed Grand Rapids station and Station WKZO, Kalamazoo, each "renders service to a substantial portion of the primary service area of the other". In its Public Notice of April 4, 1944, the Commission announced that in determining whether there was such an overlapping in a particular case, it would give consideration to "location of centers of population and distribution of population, location of main studios, areas and populations to which services of stations are directed as indicated by commercial business of stations, news broad-

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[1] Section 3.35 of the Commission's Rules and Regulations provides that:

> "No license shall be granted for a standard broadcast station, directly or indirectly owned, operated or controlled by any person where such station renders or will render primary service to a substantial portion of the primary service area of another standard broadcast station, directly or indirectly owned, operated or controlled by such person, except upon a showing that public interest, convenience and necessity will be served through such multiple ownership situation."

casts, sources of programs and talent, coverage claims and listening audience." The proposed Grand Rapids station, operating on 1230 kc with 250 watts power, approximately 50 miles distant from Kalamazoo, will not render primary service, day or night, to any part of the city of Kalamazoo, Michigan and environs. Because of objectionable interference which the Kalamazoo station receives at night from an existing station, WKZO will not render primary service at night to any portion of the primary service area of the Grand Rapids station, and in the daytime, because of the high noise level in Grand Rapids, WKZO does not render primary service to the business district of Grand Rapids. Moreover, Grand Rapids, which is the second largest business market in Michigan, is a separate and distinct community in a separate and distinct trade area from Kalamazoo, Michigan. In view of these facts, we hold that a grant of the Fetzer application would be consistent with the provisions of Section 3.35 of our Rules and Regulations.

Finally, petitioner alleges that the grant of the Fetzer application denies to it a fair hearing to which it is entitled under Section 309(a) of the Communications Act and that it violates the due process clause of the 5th Amendment to the Constitution of the United States. These allegations are entirely without merit. The Commission has not denied petitioner's application. It has designated the application for hearing as required by Section 309(a) of the Act. At this hearing, petitioner will have ample opportunity to show that its operation as proposed will better serve the public interest than will the grant of the Fetzer application as authorized June 27, 1944. Such grant does not preclude the Commission, at a later date from taking any action which it may find will serve the public interest. In re: *Berks Broadcasting Company (WEEU)*, Reading Pennsylvania, 8 FCC 427 (1941); In re: *The Evening News Association (WWJ)*, Detroit, Michigan, 8 FCC 552 (1941); In *Merced Broadcasting Company (KYOS)*, Merced, California, 9 FCC 118, 120 (1942).

From a careful review of the Ashbacker petition, the applications of Ashbacker Radio Corporation (B2-P-3609) and John E. and Rhea Y. Fetzer (B2-P-3590), and the opposition filed by Fetzer Broadcasting Company to the Ashbacker petition, the Commission finds that no valid reason has been disclosed for setting aside the June 27, 1944 grant to the Fetzer Broadcasting Company. Moreover, no rea-

son appears in the petition why the Fetzer grant, which the Commission has found would be in the public interest, should be stayed pending the filing by the petitioner of a Notice of Appeal in the United States Court of Appeals for the District of Columbia.

Accordingly, IT IS ORDERED, This 12th day of September, 1944, that the petition of Ashbacker Radio Corporation for hearing, rehearing, or other relief, directed against the action of the Commission June 27, 1944, granting the application of John E. Fetzer and Rhea Y. Fetzer, doing business as Fetzer Broadcasting Company, Grand Rapids, Michigan, for construction permit (B2-P-3590), BE, AND IT IS HEREBY, DENIED.

IT IS FURTHER ORDERED, That the request in said petition for stay of the issuance of any construction permit for the use of 1230 kilocycles at Grand Rapids, Michigan, BE, AND IT IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION
T. J. SLOWIE,
Secretary.